

REMARKS

In response to the Office Action mailed on March 3, 2008, Applicants respectfully request reconsideration of the present application in light of the enclosed amendments to the claims and the following remarks.

The Examiner rejected claims 11 and 43 (and the claims that depend from them) as indefinite. Applicants have changed claim 11 to be directed toward an amount of corn dextrin in the coating composition such that the rejection is moot. Regarding dependent claim 43, it is intended to require that the moisture barrier effects that result from the composition are provided at the location where the coating composition has been applied to the pastry substrate. Applicant respectfully submits that the claim is not indefinite.

The Examiner also rejected claims 17 and 22 over Hodge (US Patent No. 3,723,132) and in view of Baur et al. Applicants have amended these claims to require that the pastry product includes wheat flour so as to be consistent with the other claims of the application not rejected on this basis.

Next, the Examiner rejects the remaining claims over Bauer (US Patent no. 2,341,523) in view of Hodge (US Patent No. 3,723,132). As Applicants understand the rejection, the Examiner concludes that since Bauer discloses that the coating, primarily described as for paper, can be put on any food product and supposedly teaches that the coating improves shelf stability. Moreover, according to the Examiner, because the '132 patent to Hodge recognizes the problem of shelf stability and storage of a pastry, it would have been obvious to put the coating of the '523 patent to Bauer on the pastry of Hodge to solve the problem. However, a careful reading of the '523 patent reveals that the diacetate and starch containing compositions are only described as improving taste over regular diacetate compositions. There is nothing in the '523 patent about the composition improving the shelf life of a food product. In fact, to the contrary, the reference explicitly discloses that the starch, when added to the sodium diacetate improves the taste of the coating. Accordingly, since the only motivation would be to improve the taste of the sodium diacetate product by addition of the starch component, the Examiner's reasoning for combining the two references fails. There is no suggestion to use the coating of

the '523 patent to improve stability of a coated food. The only suggestion is to add it to improve taste, which is impliedly bad tasting in the first place.

Additionally, and perhaps more significantly, the compositions of the '523 patent all include sodium diacetate, which has a strong vinegar taste. (See US Patent No. 3,672,914 (Exhibit A)), which describes a dry, vinegar tasting composition containing salt and sodium diacetate; see also the current Ingredient Disclosure for the Lays® Salt & Vinegar potato chips, which states: "Salt & Vinegar Seasoning (Lactose, Sodium Diacetate, and Less Than 2% of the Following: Maltodextrin, Salt, Partially Hydrogenated Cottonseed and Soybean Oil, Malic Acid, Sodium Citrate)." (See Exhibit B). In fact, the '914 patent discloses compositions containing sodium chloride and sodium diacetate "to impart a vinegar flavor" to particular foodstuffs. ('914 patent, col. 3, line 21). Thus, Applicants respectfully submit that one of ordinary skill would not coat a pastry product with a composition containing such a flavor, which is the opposite of the flavor normally associated with pastries. Certainly vinegar flavored pastries are not generally desired.

The Examiner has also rejected the various other dependent claims using the above basic rejection, but adds, for example, the Gonzalez-Sanz reference (US Patent No. 5,439,697) to fill the missing element of using the particular oxidized and substituted wheat starch. Similarly, the Examiner further adds Lenchin (US Patent No. 4,510,166) to the rejection to reject claims limited to a certain viscosity. Significantly, Applicants respectfully submit that none of the cited references disclose or suggest the viscosity claimed. Instead, the Examiner states that it would have been obvious to include dextrin at a specific solubility level depending on the desired gel strength and texture as taught by Lenchin. Applicants respectfully submit that this rejection, like the rejection based upon the selection of the starch, presupposes that one of ordinary skill knows what gel strength and viscosity are desired in order to select which compounds. The desired viscosity would have to be gleaned from Applicants' own application, which is impermissible. Moreover, Lenchin deals with the use of starch compounds as replacements for oil and fat. There is no oil or fat in the compositions of the present invention such that there is no motivation, based upon the reference, to substitute the

converted starches of Lenchin into the presently claimed invention.

Regarding these two rejections, as Applicants understand the rejections, the Examiner relies upon Gonzalez-Sanz ('697 Patent) to fill in the "oxidized, substituted modified wheat starch" limitation of the coating composition comprising 20% to 100% starch, 5% to 75% film forming agent, and 0% to 30% sweetener, etc. limitations of various dependent claims. The Examiner's reasoning is that the '697 Patent teaches (1) that viscosity of the coating is a function of the amount of starch; (2) that starch can be chemically and physically modified, and (3) "that different modifications provide different viscosity and moisture binding results."

However, Applicants respectfully submit that there are at least three problems with the Examiner's analysis. First, the '697 Patent does not actually say that different modifications provide different viscosities. At most, the '697 Patent says that modifications to starch can change the "water affinity" of the starch. The Examiner has equated "water affinity" with viscosity, which is not necessarily true. After all, the '697 Patent itself uses the terms separately, which suggests that the two terms have different meanings. In any event, the linchpin of the Examiner's own rationale lacks direct support.

Second, Applicants respectfully submit that what the Examiner has done in making this rejection, without stating it this way, is assert that the use of oxidized, substituted modified wheat starch would have been "obvious to try" after reading the '697 Patent, because starches in general can be used for the purpose of building viscosity. To find that something was "obvious to try," the Examiner must find that "there had been a finite number of identified, predictable potential solutions to the recognized need or problem." M.P.E.P. 2143E. Here, the '697 Patent did not present "finite number" of types of starch that one could try as a means to vary viscosity. Rather, the '697 Patent teaches that "any number of starch compounds may be used" ('697 Patent at Col. 4, lines 61-62). Applicants respectfully submit that "any number" is the opposite of the "finite number" required to make an obvious to try rejection.

Third, the Examiner has failed to read the '697 Patent as a whole. If a skilled artisan wanted to build viscosity in a coating (as the problem to be solved), then, after reading the '697 Patent, the skilled artisan would have learned that sweeteners (many kinds) provide

viscosity ('697 patent, col. 3, lines 35-39), shortening (many kinds) provides "body" ('697 patent, col. 3, line 68), and that starch ("any number" of them) provides viscosity. The skilled artisan could very well have chosen to use sweetener in the disclosed range of about 30% to 90% to add viscosity to the coating. Applicants respectfully submit that to use the '697 Patent in the way that the Examiner has suggested, the skilled artisan would have had to ignore the teachings regarding the use of sweeteners and shortening to alter viscosity, instead only use starch, and then chose the specific type of starch of the present claims from the "any number starch compounds" that could be used. It is safe to say that a skilled artisan would not have done that based upon the cited reference(s); only with hindsight, using the claims at issue as a roadmap, does one use the '697 Patent to reach the claimed invention. "Determination of obviousness cannot be based on the hindsight combination of components selectively culled from the prior art to fit the parameters of the patented invention." *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546 (Fed. Cir. 1998). Yet, Applicants respectfully submit that is exactly what the Examiner has done in making the above-discussed rejections. Accordingly, for at least the above reasons, Applicants respectfully submit that the rejections are not proper and should be withdrawn.

Finally, as discussed in the previous Office Action, where a provisional obviousness type double patenting rejection is all that remains, the Examiner should withdraw the rejection and permit the present application to issue without a terminal disclaimer (see §804 of the M.P.E.P.).

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Applicants respectfully submit that Applicants have made an effort to place the present application in condition for allowance, and a notice to this effect is earnestly solicited. In the event there are any remaining formalities or other issues needing Applicants' assistance, Applicants request the Examiner to call the undersigned attorney.


Respectfully submitted,

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By: Price, Heneveld, Cooper,
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Date

TAV/dar/jbs


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